

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

|                         |   |              |
|-------------------------|---|--------------|
| JOHN FLOYD              | : | CIVIL ACTION |
|                         | : |              |
| v.                      | : |              |
|                         | : |              |
| DONALD T. VAUGHN, ET AL | : | NO. 97-799   |

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.

January 15, 1998

Petitioner, a state prisoner convicted of rape, robbery and criminal conspiracy, has filed a petition for habeas corpus under 28 U.S.C. § 2254. After his conviction had been affirmed by the Superior Court and his petition for allowance of appeal had been denied by the Pennsylvania Supreme Court in 1989, petitioner filed a state court petition for collateral relief under the Pennsylvania Post-Conviction Hearing Act ("PCHA") 42 Pa. Cons. Stat. Ann. §§ 9541-9551.<sup>1</sup> His first petition was dismissed on the merits and the direct appeal to the Superior Court was denied for failure to file a brief. His second PCRA request for collateral relief was dismissed and leave to appeal directly to the Pennsylvania Supreme Court was denied in 1992. His third PCRA proceeding in 1994 (following a 1993 denial of federal habeas for failure to exhaust state remedies) was dismissed in 1994 as an improper successive petition; on direct appeal to the Superior Court, the summary dismissal of petitioner's third PCRA

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<sup>1</sup> Pennsylvania's PCHA was subsequently amended in 1988 and is now entitled the Post-Conviction Relief Act ("PCRA") §§ 9541-46.

petition was affirmed, Commonwealth v. Floyd, 665 A.2d 1299 (Pa. Super. 1995); the Supreme Court denied allowance of appeal on March 18, 1996.

This petition, filed February 3, 1997, made seven claims:

1. Denial of his constitutional right to a speedy trial.
2. Prosecutorial misconduct in comments regarding petitioner's failure to testify and his personal belief in the victim's credibility;
3. Ineffective assistance of trial counsel for (a) failure to object to the prosecutor's misconduct, (b) failure to interview a witness who would have testified about the character of the victim, (c) failure to file a pretrial motion challenging the right of the Commonwealth to impeach petitioner with were to four (4) prior crimen falsi convictions if he to testify, and (d) advising petitioner not to testify;
4. Trial court misconduct;
5. Right to a new trial based on after-discovered evidence;
6. Improper placement in the Career Criminal Program; and
7. Unfairness of the first PCRA proceedings because the PCRA judge had presided at petitioner's trial.

Two claims (denial of his constitutional right to a speedy trial and unfairness of the first PCRA proceedings because the judge was biased) are procedurally barred. Because they were not raised in petitioner's original petition for collateral relief, they cannot be considered in the absence of legally sufficient cause for the procedural default or prejudice.

Three claims (prosecutorial misconduct, ineffective assistance of counsel and after-discovered evidence) were

presented to the Pennsylvania Supreme Court and are appropriate for habeas corpus review. The remaining two claims (trial court misconduct and improper placement in the Career Criminal Program) were not considered by the Pennsylvania appellate courts; they were dismissed by the Superior Court for failure to file a brief, although it is conceded by defendant that petitioner did not receive a copy of the briefing schedule. Therefore, these claims were considered on the merits by the Magistrate Judge to whom the habeas petition was referred.

On April 25, 1997, the Magistrate Judge filed a Report and Recommendation that the petition and motion for appointment of counsel be denied. Thereafter, petitioner filed a Motion for Request for Production of Transcripts, a Motion for Extension of Time to File Traverse/Amendment to Petition for Writ of Habeas Corpus and Objections to the Report and Recommendation. The court has reviewed de novo, plaintiff's Petition, the Response, the record before the court, the Report and Recommendation, plaintiff's subsequently filed motions and objections, defendant's reply to the motions and response to the objections, and disposes of them as follows:

Petitioner objects to the Report and Recommendation having been filed on April 25, 1997, because the respondent's answer was filed on or about April 15, 1997; he claims he was entitled to thirty (30) days after respondents filed their answer to file a traverse (citing 28 U.S.C. § 2254 Rules Advisory Committee Note 5) and E.D. Cal. Rule 191). However, Local Rule for the Eastern

District of Pennsylvania 72.1, IV (b), provides ten (10) days for filing written objections to a Report and Recommendation.

Petitioner was so notified by Notice dated April 28, 1997, and did in fact file timely written objections.

Petitioner's Motion for Extension of Time to File Traverse/Amendment to Petition for Writ of Habeas Corpus will be denied because:

1) Petitioner has already timely filed written objections to the Report and Recommendation; and

2) No leave has been given for an amended habeas petition and none will be given to assert Batson violations. Even if blacks were excluded from his trial and a black female juror was excused without cause, these issues were never raised in state court, nor was counsel's ineffectiveness asserted for failure to raise them; they cannot be raised here now.

Petitioner objects to findings based on respondent's answer, the Superior Court opinion and appointed counsel's "Finley letter,"<sup>2</sup> because respondents did not produce the portions of the state court testimony that would serve "to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts." Petitioner objects to any and all proceedings herein until the court reviews the complete state court records and transcripts, especially the transcript of March 12, 1991, to prove the bias of the trial judge and that certain

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<sup>2</sup> Pennsylvania v. Finley, 481 U.S. 551 (1987).

claims were not waived or procedurally defective. These transcripts were not requested prior to the Magistrate Judge's Report and Recommendation; petitioner claims the transcripts are necessary for proper review. Petitioner also claims the Magistrate Judge reviewed only respondent's answer, the Superior Court opinion, and counsel's Finley letter, but not the complete state court record and transcripts. It is not clear this is so, because the record that was produced by the state was available to the Magistrate Judge. In any event, having reviewed the complete state court record and transcripts de novo and checked the factual allegations against the transcripts, this court finds no federal constitutional violations sufficient to grant habeas relief with regard to prosecutorial misconduct regarding alleged comments on petitioner's failure to testify or the credibility of the victim's testimony, ineffective assistance of counsel, trial judge bias, or denial of a new trial for after-discovered evidence. The court agrees with the Magistrate Judge as to these issues.

Petitioner finally objects to the statement of the Magistrate Judge that his sentence as a career criminal was valid because of 11 adult arrests, leading to 7 convictions and 3 commitments; he argues that arrests are common and not the equivalent of convictions, some summonses to court were based on mistaken identity, and the commitments were in 1982. He also challenges four (4) violations of probation and parole mentioned in the Report and Recommendation but not his extensive juvenile

record.

Petitioner is correct that prior convictions, not arrests, determine whether a defendant is sentenced as a career criminal; however, petitioner clearly had a sufficient number of convictions for sentencing as a career criminal; Commonwealth v. Carter, 501 A.2d 250, 251 (Pa. Super. 1985). A claim of statutory right under state law is not a federal constitutional claim subject to federal habeas review. See Coleman v. Thompson, 501 U.S. 722 (1991); Tillett v. Freeman, 868 F.2d 106 (3d Cir. 1989). The Pennsylvania Career Criminal Program is not unconstitutional; it bears a rational relationship to a legitimate state purpose: special and more severe treatment for repeat offenders for particular crimes.

The Report and Recommendation will be approved and adopted.

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ORDER

AND NOW, this 15th day of January, 1998, upon consideration of petitioner's Petition for Writ of Habeas Corpus; the response of the government in opposition thereto; the Report and Recommendation of the U.S. Magistrate Judge; the petitioner's objections thereto; the government's Response to Petitioner's Objections; Petitioner's Request for the Production of Transcripts; the government's response in opposition thereto; the petitioner's reply thereto; and petitioner's motion for an extension of time to file a traverse/amendment; it is **ORDERED** that:

1. The objections are **OVERRULED**.
2. The Report and Recommendation is **APPROVED AND ADOPTED**.
3. The petition for writ of habeas corpus is **DENIED**.
4. The motion for appointment of counsel is **DENIED**.
5. The motion for production of transcripts is **DENIED**.
6. The motion for an extension of time to file a traverse/amendment is **DENIED**.
7. There is no probable cause to issue a certificate of appealability.

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J.